United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

To Be Argued by
HAROLD BAER, JR.

75-1194

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 75-1194

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ARNOLD PERER,

Defendant-Appellant.

On Appeal from the United States District Court For the Southern District of New York

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BRIEF FOR DEFENDANT-APPELLANT ARNOLD PERER

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UNITED STATES COURT OF APPEALS
FILED
MAY 30 1975
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

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BRIEF FOR DEFENDANT-APPELLANT ARNOLD PERER

I. STATEMENT OF THE CASE

A. Statement of the Proceedings

Appellant Arnold Perer appeals from a judgment of conviction entered on December 17, 1974 in the United States District Court for the Southern District of New York after a three-day trial from October 29 - 31, 1974 before the Honorable Charles L. Brieant, Jr., United States District Judge and a jury.

A two-count indictment, 74 Cr. 529, was filed May 21, 1974. Count One charged the defendant with knowingly engaging in the business of dealing in firearms without a license from on or about November 23, 1973 to on or about December 9, 1973 in violation of Title 18, United States Code, Sections 922(a)(1), 924(a) and Section 2. Count Two charged the defendant with the interstate transportation of twenty-eight firearms in violation of Title 18, United States Code, Section 922(a)(3), 924(a) and Section 2.

On May 28, 1974 defendant pleaded not guilty to both counts of the indictment before the Honorable John M. Cannella, United States District Judge. Defendant remained at liberty on a $5,000 personal recognizance bond.

Defendant filed a motion to suppress certain evidence but said motion was withdrawn at the time of trial.

At the close of the Government's case and again at the end of the defendant's case, Judge Brieant denied the motions to dismiss the indictment and for a judgment of acquittal (Tr. 145, 263). A verdict of guilty was returned against the defendant on both counts.

On November 12, 1974 Judge Brieant denied defendant's motion to set aside the conviction and to order a new trial.

On December 17, 1974 the defendant was sentenced by Judge Brieant pursuant to Title 18, Section 4208(a)(1) to a term not less than one year and not more than five years on each of the two counts, the sentences to run concurrently. A stay and a continuance of bail pending appeal was granted.

On December 24, 1974 a notice of appeal was duly filed.

On February 11, 1975 the United States Court of Appeals for the Second Circuit dismissed defendant's appeal for failure to file a brief. On March 31, 1975, defendant's surrender date, defendant appeared before Judge Brieant and moved for a reduction of sentence pursuant to Rule 35 of the Federal Rules of Criminal Procedure. This motion was denied on April 2, 1975. During the hearing on the Rule 35 motion, and upon application and a showing by defendant of the circumstances surrounding the dismissal of defendant's appeal, Judge Brieant postponed

defendant's surrender date and continued bail to allow the defendant to obtain counsel under the Criminal Justice Act in order to seek the reinstatement of his appeal.

On March 31, 1975 Harold Baer, Jr. was appointed counsel by U. S. Magistrate Harold J. Raby of the United States District Court for the Southern District of New York pursuant to the Criminal Justice Act for the limited purpose of seeking the reinstatement of defendant's appeal. On April 10, 1975 defendant-appellant moved for a vacateur of its prior order dismissing defendant's appeal and for the reinstatement of the appeal. On April 22, 1975, after oral argument, the Second Circuit granted the motion. On the same day Judge Brieant continued bail pending appeal.

On May 5, 1975 Harold Baer, Jr. was appointed as counsel to represent the defendant on appeal pursuant to the Criminal Justice Act.

B. Statement of Facts

On December 7, 1973, defendant Arnold Perer ("Perer") and his cousin, Kenneth Hochman ("Hochman") went to the State of Virginia where they purchased 28 firearms. On December 9, 1973 they returned to New York City via the George Washington Bridge. As they crossed the bridge they came under the pre-arranged surveillance of Special Agents Vincent Mazzilli ("Mazzilli") and Anthony F. Varcos ("Varcos") of the Bureau of Alcohol, Tobacco and Firearms of the United States Treasury Department. The agents followed Perer's car to the Bronx, and stopped it and arrested Perer and Hochman without a warrant. At the time of the arrest, the agents made a warrantless search of the car, seizing two guns from the back seat, twenty guns from the trunk, and six guns from a locked suitcase belonging to Hochman (Tr. 63-65).

Following arrest and indictment Perer pleaded not guilty: Hochman entered a plea of guilty to similar charges and was later sentenced by the Honorable Murray I. Gurfein of the United States District Court for the Southern District of New York.

The arrest of Perer and Hochman was the culmination of a government undercover operation which was designed to persuade Perer to sell guns to government agents in their

undercover capacity. The Government's operation began sometime in July, 1973, just after Alexander Rojas ("Rojas") had been arrested for dealing in guns (Tr. 75). Rojas then agreed to cooperate with the Government in their investigation of the violations of the Gun Control Act of 1968 in anticipation of receiving assistance from the United States Attorney in the disposition of his case (Tr. 73, 76, 78, 153, 158, 159, 162).

From this point on in July through the period covered by the indictment, November 23 - December 9, 1973, Rojas, acting as a government informer, visited and telephoned Perer on frequent occasions for the purpose of purchasing guns from him (Tr. 156, 158, 159). Rojas also introduced Perer to Mazzilli in his undercover capacity for the same purpose (Tr. 148, 158, 73).

At trial Mazzilli testified to certain meetings and conversations with Perer between October 14 and November 23, 1973 in which he alleged that Perer agreed to sell him guns (Tr. 11-24). Mazzilli also testified that on November 23 he purchased two guns from Perer and Hochman in the courtyard of 808 Adee Avenue, the apartment house where both Perer and Hochman separately resided (Tr. 28-32). Mazzilli further

testified that he and his partner, Special Agent Alexander D'Atri ("D'Atri"), purchased a total of three guns from Perer and Hochman on November 26 at Perer's apartment (Tr. 40-41). At that time Mazzilli placed an order for 20 more guns (Tr. 40).

At trial Perer denied that he ever agreed to sell guns to Mazzilli between October 14 and November 26 (Tr. 246, 262). Perer testified that he was present during the transactions occuring on November 23 and 26, and that these transactions were gun sales strictly between Hochman and the agents, and that he, Perer, had taken no part in them (Tr. 243). Perer did not dispute that in fact on December 7 he accompanied Hochman to Virginia and purchased the guns identified in the indictment. Nevertheless, at trial, in addition to denying the charges contained in Count I regarding dealing in guns, Perer raised the defense of entrapment. He testified that beginning in July and continuing until December 7 when he went to Virginia, the Government applied an inordinate amount of pressure to induce him to engage in the conduct for which he was indicted (see Argument IA, infra.). He also testified that although he initially refused to do so, he finally succumbed only after continued increased financial inducements (see Argument IA, infra.).

At trial the Government called as witnesses Mazzilli, D'Atri and Varcos. During the opening statement the Assistant United States Attorney told the jury that the Government would also call both Rojas and Hochman (Tr. 6), but later declined to do so. The defendant then called Rojas and Hochman and was forced to treat them as hostile witnesses. After the close of Hochman's testimony, the Government stipulated that Hochman lied by denying that the Assistant United States Attorney had agreed to write a letter in his favor to the Parole Board in return for his cooperation (Tr. 212).

As a part of the defense, the defendant called several character witnesses as well as his wife, in addition to testifying on his own behalf.

I

THE LOWER COURT ERRED BY FAILING TO FIND ENTRAPMENT AS A MATTER OF LAW

A. Where, as here, the Government induced the defendant to commit the crime charged without having a predisposition to do so, entrapment must be found as a matter of law.

The defense of entrapment will be sustained where the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute. Sherman v. United States, 356 U.S. 369, 372 (1958); Sorrells v. United States, 287 U.S. 435, 442; United States v. Russell, 411 U.S. 423, 435 (1973). The keystone of this rule is to prevent the manufacturing of crime by the Government and its use by the Government as a"trap for the unwary innocent". Sherman, supra at 372. The rule condemns "stealth and strategy" as objectionable police methods in the same way as the coerced confession and the unlawful search. Id. Consequently, where the criminal conduct was "the product of the creative activity" of law-enforcement officials, the defense of entrapment must bar the prosecution of the accused as a matter of law. Id.

The United States Supreme Court, in United States v.

Russell, supra in its most recent reassessment of the entrapment defense, refused to disregard the two-pronged test of the entrapment defense in its application to the case before it. The test, as eloquently stated by Judge Learned Hand in United States v. Sherman, 200 F.2d 880, 882-883 (2d Cir. 1952), reversed on other grounds 356 U.S. 369 (1958), is as follows:

> "[I]n such cases two questions of fact arises: (1) did the agent induce the accused to commit the offence charged in the indictment (2) if so, was the accused ready and willing without persuasion and was he awaiting any propitious opportunity to commit the offence."

The test requires that, once it is shown that the Government instigated the commission of the crime charged, the prosecution must prove beyond a reasonable doubt that the defendant was ready and willing to commit the offense. United States v. Rosner, 485 F.2d 1213, 1222 (2d Cir. 1973), cert. denied 417 U.S. 950 ( ); United States v. Braver, 450 F.2d 799, 804-805 (2d Cir. 1971), cert. denied 405 U.S. 1064 (1972). Following a showing of inducement, there are three ways to prove predisposition. Without proof of one or more elements there is no sufficient showing and the Government's burden remains unsatisfied. The three elements are:

1) An existing course of criminal conduct similar to the crime for which the defendant is charged.

2) an already formed design on the part of the accused to commit the crime for which he is charged; or

3) a willingness to commit the crime for which he is charged as evidence by the accused's ready response to the inducement. United States v. Viviano, 437 F.2d 295, 299 (2d Cir.), cert denied 402 U.S. 983 (1971).

Appellant contends that, based on the foregoing tests, the Government induced the defendant who was not predisposed to committing the offenses charged, and therefore that he is entitled to a finding that there was entrapment as a matter of law. See United States v. Klosterman, 248 F.2d 191 (3d Cir. 1957); Carbajal-Portillo v. United States, 396 F.2d 944 (9th Cir. 1968); United States v. Cunningham, 349 F. Supp. 1115 (M.D. Fla. 1972); United States v. Owens, 228 F. Supp. 300 (D.D.C. 1964); United States v. Smith, 508 F.2d 1157 (7th Cir. 1975) (Swygert, C.J. dissenting).

Turning first to inducement, there is little doubt that the Government instigated the crimes with which the defendant was charged. The testimony is clear that through its agent, Alexander Rojas,[1] the Government planted in the mind

[1] Rojas admitted to his role as government informer from July 1973 through approximately December, 1973, (Tr. 153, 158, 159, 162). In addition to acting on behalf of the Bureau of Alcohol, Tobacco and Firearms of the U.S. Treasury Department, he acted in an undercover capacity for the Drug Enforcement Agency in connection with five other cases (Tr. 168). Agent Mazzilli also corroborated his role as a government informer (Tr. 73, 76, 78).

of defendant Perer the initial notion of purchasing guns with the intent of selling them to Special Agent Mazzilli in his undercover capacity more than four months prior to the period covered in the indictment. At the very beginning of the Government's operation in July, 1973, Rojas admitted that he told Perer, "This guy [Mazzilli] is bugging me, he is on my back, he wants some guns; just tell him you can get some guns and get him off my back" (Tr. 154). Rojas testified that he told Perer, "Arnie, the b[g]uys been around five times. Why don't you just come out and that way he doesn't think I am lying to him and tell him you can get them." (Tr. 155).

Furthermore, it was unquestionably Rojas who introduced Perer to Mazzilli in his undercover capacity (notwithstanding a divergence in testimony as to when this first meeting occurred.)[2]

These occurrences, compounded by the incredible series of events in which the Government lured, persuaded and seduced the defendant to engage in the criminal conduct, in

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[2] According to both Perer and Rojas, Perer was first introduced to Mazzilli in July, 1973. (Tr. 148, 158, 240, 251). Rojas also testified that Mazzilli accompanied Rojas to Perer's house and remained outside while Rojas conversed with Perer and said "This guy is bugging me" [about guns] (Tr. 154). On the other hand, Mazzilli testified that this first face to face meeting occurred on October 14, 1973. (Tr. 73).

fact, did result in the commission of the crimes charged. This evidence of instigation alone is sufficient to sustain the defendant's burden of showing some evidence of inducement and to shift the burden of proof of predisposition to the Government. See United States v. Braver, supra at 805.

A determination with respect to predisposition is somewhat more complex. Nevertheless, the facts clearly demonstrate that Perer was not predisposed under any of the three-pronged tests set forth above, but rather, resisted the inordinate number of continuous requests for the purchase of guns by the government agents until the pressure became too great. Then he succumbed.

In considering first the third of the three alternative predisposition tests set forth above, e.g., a willingness to commit the crime, the defendant clearly did not show a ready response to the inducement. Like the defendant in Sherman who initially refused to supply Kalchinian, the government informer, with the requested narcotics, but later acquiesced, Sherman, supra at 371, Perer initially refused and relented

only after repeated requests, each accompanied by increased financial inducements. Cf. United States v. Smith, 508 F.2d 1157, 1160 (7th Cir. 1975)[3]; United States v. Watson, 489 F.2d 504 (3d Cir. 1973).

Perer refused to sell Rojas guns both before and after Rojas became a government agent in July. Perer testified:

> "He [Rojas] came to me and he asked me if I could get any guns. I told him no. He knew I had owned two guns and he had been trying to buy those two guns from me for the longest time and I just would not sell them to him because they were for my own personal use in the home. I told him I would not sell them". (Tr. 240).

Perer then testified in order to do Rojas a favor at the time Rojas had approached him in July to "get the guys off his back", he told the agent outside [presumably Mazzilli], that he could get him guns. (Tr. 240). From Rojas' statement Perer could easily have believed that Rojas had somehow been threatened by the agent, cf. Greene v. United States, 454 F.2d 783, 787 (9th Cir. 1971), and that by telling the agent that he could

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[3] The majority acknowledged that where a defendant initially refuses but later acquiesces under substantial government pressure, such a pattern could constitute entrapment as a matter of law, but that conflicting testimony on this question existed so that it was a question for the jury. Nevertheless, in a vigorous dissent by Chief Judge Swygert, he found that the evidence showed at least five separate occasions on which the defendant was contacted prior to the sale for which he was convicted, thus sustaining the defense of entrapment as a matter of law. On the other hand, here uncontradicted testimony by Rojas unequivocally shows that at least fifteen to twenty contacts were made to Perer prior to the transactions in November. (See discussion, infra.)

supply him with guns he would somehow protect his friend from harm. Whatever the reason Perer had for approaching the agent and making such a statement, it is clear that he had no real intention of supplying the agent with guns, since even after repeated requests by Rojas he continued to refuse to sell him guns.

Perer stated:

> "From that point on [July] he [Rojas] came with regularity wanting to buy guns. 'Can I get guns?'. I kept telling him, 'No. I have these, they are mine. The rifles are for display, I will not sell them, you know. I have no means of buying guns'". (Tr. 240-241) (emphasis added).

Perer reiterates his early refusal to engage in any deals involving the sale of guns. In describing the circumstances of the first meeting between Mazzilli and Hochman which he asserted took place in July (Tr. 250-251), Perer stated:

> "I was talking to the agents and Kenny came along and he heard me say that, no, I couldn't get no guns and that you know, I had no information as toward guns, and Kenny right away said, what you'se want? I will get you all the guns you want.
>
> And I told the agents on the following occasion, I says, 'Listen, if anything, does go on between you and Kenny, I've got nothing to do with it. It's you and Kenny, and I bowed out.'" (Tr. 251).

There was a period of approximately four months between the time of Rojas' initial request for guns and the period covered in the indictment which begins in late

November. This corroborates Perer's testimony not only of his initial refusal and unwillingness to become involved in dealing in guns but also supports his claim that he had no means of purchasing guns because otherwise, he could have supplied the agents with them during that period. The additional fact that during the lengthy period of government entanglement Perer neither sold or attempted to sell guns to anyone other than the government agents further supports the defendant's claim of entrapment.

Of course, the degree of government pressure is properly considered under the element of predisposition as it has a direct bearing on the accused's willingness to respond to the inducement of the government agents. United States v. Viviano, supra at 299. United States v. Klosterman, supra at 195; cf. Kadis v. United States, 373 F.2d 370, 373 (1st Cir. 1967). As will be shown, the intensity and duration of government pressure over a period of four to five months was so great so as to overcome substantial resistance.[4] See United States v.

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[4] It has even been suggested that "[t]he government must not lead astray by persuasion or proffered delight even those who had some criminal instincts but who normally avoid and through self-struggle resist ordinary temptations. Pierce v. United States, 414 F.2d 163, 165-166 (1st Cir.) cert. denied 396 U.S. 960 (1969).

Klosterman, supra; United States v. Owens, supra at 304.

Undisputed evidence reflects the overwhelming number and nature of government contacts with Perer between July and November 1973. Rojas testified that between July and September, he visited Perer at his home for the purpose of discussing the purchase of guns approximately fifteen or twenty times in addition to telephoning him on a number of occasions. (Tr. 156, 159).[5] During the months of October and November, 1973, Rojas continued to make frequent visits to Perer and acted as a liaison for Mazzilli for the purpose of inducing Perer to sell guns to him. Corroboration for this blatant effort at entrapment is seen in the undisputed testimony of Special Agent Mazzilli. He recounts Rojas' role in the events occurring between October 14, 1973, and November 23, 1973.[6] In response to a question as to who accompanied Mazzilli during his visits with Perer on October 14, Mazzilli stated:

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[5] This testimony is corroborated by Perer and his wife, Ramona Perer. (Tr. 253, 215).

[6] See also Rojas' testimony confirming his frequent visits to Perer's home in November, 1973. (Tr. 158).

A. I was with Alexander Rojas.

* * *

A. Alex knocked on the defendant's window.

Q. What happened?

A. The defendant came out and we engaged in a conversation relative to guns. (Tr. 85).

In responding to the court's question as to whether Rojas had a conversation with Perer at that time, Mazzilli stated:

A. No, sir, just an introduction, that is all. This is Vinnie, and that was it. (Tr. 86).

Mazzilli testified that Rojas was present during the transaction on November 23, 1973:

A. He [Rojas] was standing with my partner not taking part in the conversation and away from the conversation. (Tr. 92).

Mazzilli also contributed to the Government's pressure. Notwithstanding Perer's and Rojas' claim that Mazzilli met Perer in July, Mazzilli testified that he had himself telephoned, visited or attempted to visit Perer on nine to ten separate occasions between October 14 and November 23, 1973. (Tr. 85).

At some point Perer began to crack. Whether this point occurred on October 14 or not until December when Perer planned his trip to Virginia is unimportant. Even if it were October, this was at least four months after the

initial approach by Rojas in his role as a government agent. In the light of the Government's conduct during this period, it was sufficiently long to overcome Perer's unwillingness to engage in criminal conduct to prevent the Government from satisfying its burden of proof on predisposition. Therefore, because of the gap between the instigation of the crime and at least four months after when Perer's resistance began to yield, compounded by the utter contamination of the Government's inducement, events occurring after October 14 which might reflect a willingness on Perer's part to comply with the Government's scheme should have been disregarded for purposes of determining predisposition. The jury obviously improperly considered testimony regarding events after October 14, since no limiting instruction was given.

Rojas' awareness of Perer's background is also pertinent in showing the true nature of the Government operation. Apparently, Rojas knew that Perer was getting married, setting up a home and was planning a honeymoon for which he could use extra money (Tr. 170-171, 216). He knew that Perer was a former drug addict who had been involved with the law before, but who, for the last three to four years, had successfully participated in a methodone program and wanted to make a new life for himself. He also knew that because of Perer's background and present circumstances he would likely be susceptible

to inducement once enough pressure was brought to bear. Rojas knew that eventually he could find Perer's breaking point. And he did.

The unrelenting pressure of the increased financial inducements is also relevant to the inquiry into Government pressure. Perer testified that after he told Rojas that he had no means of buying guns, Rojas kept increasing the price of his offer for guns:[7]

> "He [Rojas] kept telling me that I could name my own price, that they wanted to offer me a hundred dollars, and the next time he come it was $150, and then it was $200. You know, each time he came he kept telling me that they would give me more and more money, if I would do this for them." (Tr. 241).

In fact, according to Mazzilli he did pay $200 and $225 for two guns, respectively,on November 23 and that he and D'Atri paid $200 for each of three guns purchased on November 26.[8] (Tr. 31 and 41).

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[7] Ramona Perer testified in a similar vein (Tr. 216).

[8] Perer claims he took no part in these transactions (Tr. 243), nor participated in any other transaction involving the sale of guns from July up to December 7, 1973 (Tr. 246, 262). It is apparent that Perer believed the definition of "participating in gun sales" to exclude being present at some negotiations between Hochman and the agents. Perer testified that he had been present at some of the negotiations between Hochman and the agents but that Hochman made all the arrangements and "set prices, and everything". (Tr. 261).

Furthermore, the overwhelming number of contacts by the agents to inveigle the defendant particularly by Rojas, was very real to Perer. It was the kind of unrelenting pressure, a kind of whittling away of Perer's resistance to the point where he could no longer help himself. This is hardly predisposition. During cross-examination Perer was asked how Rojas had pressured him to sell guns to Mazzilli and D'Atri:

> Q. What pressure was placed on you to deal with the agents?
>
> A. The fact that they came to my house every day two or three times a day.
>
> Q. The agents you are referring to?
>
> A. Agents and Alex, both of them.
>
> Q. I want you to specify. Who came to your house, how many times?
>
> MR. RICHMAN: Objection. If he can, Your Honor.
>
> THE COURT: Overruled.
>
> Who came to your house, how many times starting July?
>
> THE WITNESS: Alex came to my house so many times it is really unbelievable how much times he approached me and called me and came to the house. I couldn't tell you exactly how many times, but it was him (Tr. 253-254).

This intense degree of pressure was clearly intended. Rojas was cooperating as a government informer in anticipation

of receiving favorable treatment by the Government in regard to the disposition of an indictment in his own case. He had been arrested in an unrelated matter on July 16, 1973 for dealing in guns (Tr. 74-75). Rojas desperately needed to make a case for the agents in order to prevail upon them to have the Assistant U.S. Attorney note his cooperation to the court at the time of sentencing. He needed to implicate someone. He chose Arnold Perer saying he had been his source. Yet the record does not substantiate this point.

The dearth of evidence in this regard in fact negates any argument of predisposition regarding the first predisposition test under Viviano, e.g. an existing course of similar criminal conduct.[9] There is no testimony by any witness as to specific transactions clearly showing that Perer acted as Rojas' source of firearms prior to the time Rojas became a government agent in July, 1973. During his testimony, Rojas made several broad statements concerning alleged buys from

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[9] Of course, the question of predisposition cannot be established by evidence that the defendant has a criminal record. Hansford v. United States, 303 F.2d 219 (D.C. Cir. 1962). Based upon this rationale, testimony of Perer's prior arrest record or life as a drug addict which has no relationship to the charge of dealing in firearms may not be considered in determining predisposition.

Perer. (Tr. 159, 171, 196).

Yet at no time does Rojas describe the circumstances of such sales to sufficiently show that in fact Perer was the one who sold guns to him. In fact the only two incidents described in any degree of particularity by Rojas in which Perer is mentioned in connection with gun sales during this early period, e.g., the incident in the park (Tr. 163) and the incident with the truck driver (Tr. 173-174), failed utterly to make this point. As to the incident in the park, Rojas merely testifies that Perer introduced Rojas to Hochman but that it was Hochman who told Rojas that "he [Hochman] could get a lot of guns". (Tr. 163). There is no mention of an actual transaction with Perer or even a promise by Perer to supply Rojas with guns.[10] As to the incident with the truck driver, the record clearly shows Rojas' confusion as to whether Perer or the truck driver in fact sold him the gun. (Tr. 173).

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[10] Guilt by association has certainly been condemned by our courts from time immemorial. Cf. United States v. Owens, supra.

It also must be pointed out that whatever remote inferences might be raised from this uncorroborated testimony, the intention whether consummated or not, to commit past crimes should be distinguished from the intention necessary to negate the defense of entrapment. United States v. Cunningham, 349 F.Supp. 1115, 1117 (M.D. Fla. 1972). In support of this point, the Court stated:

> "To accept [the contrary] contention would be to destroy the concept of entrapment. If a man who makes his livelihood from the sale of moonshine whiskey is cajoled by a public officer or his agent, into selling the last bottle of a batch - the one he had meant for himself - he has been entrapped no less than the man, who, finding himself in possession of a jug of illicit spirits for the first time in his life, is likewise induced to sell it. Otherwise, setting up the defense of entrapment would broaden the scope of a prosecution in an impermissible manner."

Rojas' vague and confused testimony of prior gun sales also fails to satisfy the last requirement of showing predisposition, e.g., an already formed design on the part

of Perer to engage in the transactions which are the subject of the indictment. Even if it did, arguendo, it is negated by the evidence of Perer's refusal to deal in guns as discussed, supra. The court in Klosterman reached a similar conclusion. There, the defendant Deeney had approached King, a special agent of the I.R.S. for purposes of bribery but had apparently abandoned his scheme. The court stated:

> "The inordinate amount of persuasion of Deeney by King indicates two elements in this case. It clearly discloses that Deeney was sincere in his attempt to abandon his original plan. It shows also that the criminal design and intent for the commission of the actual bribery originated not with him but rather with the government agents who engineered the persuasion and solicitation." Klosterman, supra at 195.

The conclusion from all this is inescapable. The events which took place were a part of a scenario wholly devised by the Government, and which culminated, as planned, in the commission of the offenses charged. There is little doubt that here "the power of the Government [was] abused and directed to an end for which it was not constituted when employed to promote rather than detect crime." Sherman v. United States, supra at 384 (Frankfurter, J. concurring).

This is a case where the admonition by the First Circuit against improper governmental conduct is applicable:

> "Extreme police tactics, for example, of badgering or making massive appeals to the sympathy of an obviously reluctant person will mean that as a matter of law the government cannot be found to have sustained its burden of proving that it did not corrupt an innocent or unwilling man." Kadis v. United States, supra at 373.

As demonstrated above, there was insufficient evidence to have sent this case to jury. Therefore, the Court erred in failing to find entrapment as a matter of law, and in denying defendant's motion to dismiss the indictment and for judgment of acquittal at the close of defendant's case.

B. Where, as here, the Government's conduct exceeded the bounds of fundamental fairness, under the Russell exception this Court must find entrapment as a matter of law.

Regardless of whether this Court finds entrapment as a matter of law on the basis of insufficient evidence of predisposition, Appellant urges that the Government's conduct in persuading the defendant to commit the crimes charged exceeded the bounds of fundamental fairness so that the lower court should have found entrapment as a matter of law, regardless of any evidence of predisposition.

The Supreme Court in Russell specifically fashioned this rule as an exception to its reaffirmance of the majority decisions in Sherman and Sorrells:

> "While we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction, cf. Rochin v. California, 342 U.S. 165 (1952), the instant case is distinctly not of that breed." 411 U.S. at 431-432.

The Tenth Circuit has recently acknowledged the existence of the Russell exception in United States v. Spivey, 43 U.S.L.W. 2307, 2308 (10th Cir. Jan. 6, 1975) by stating:

> "We recognize that, under Russell, a positive test for outrageous conduct is, by itself reason enough for the reversal of a conviction notwithstanding that the

> defendant was predisposed, and notwithstanding that the criminal otherwise goes free. It is this that Russell's constitutional standard protects the 'sense of justice' referred to in Rochin v. California, 432 U.S. 165, 173 (Frankfurter, J.) and in Brown v. Mississippi, 297 U.S. 278, 286 (Hughes, C.J.)."

The facts and circumstances here require the application by this Court of the Russell exception as envisioned by the Supreme Court. The overzealousness on the part of the Government agents in persuading the defendant to commit the crimes for which he was charged clearly violates that "fundamental fairness shocking to the universal sense of justice as mandated by the Due Process Clause of the Fifth Amendment". See Russell, supra at 432; Kinsella v. United States ex rel Singleton, 361 U.S. 234 (1960).

As already demonstrated, not only did the Government, through its agents, instigate the crime by implanting in the mind of the defendant the idea of procuring guns for the purpose of selling them to government undercover agents, but it also deliberately applied continuous pressure on the defendant which ultimately persuaded him to participate in the unlawful scheme contrived by the Government. This government activity rose to such an intolerable degree that it is

appropriate to find entrapment as a matter of law under the Russell exception, without inquiring into the question of predisposition. See also Greene v. United States, 454 F.2d 783 (9th Cir. 1971); Accardi v. United States, 257 F.2d 168, 172-173 (5th Cir. 1958), cert. denied 358 U.S. 883 (1958).

Therefore, conviction should be reversed.

C. Entrapment as a matter of law is established where governmental conduct is blatantly improper, and where proof of predisposition is disputed and at best, slight.

We submit that this case calls for utilization by this Court of the Russell exception. Nonetheless, we urge that this Court adopt a rule that may slightly modify the standard set forth in Russell. In entrapment cases upon a showing of inducement, where governmental conduct is blatantly improper and where proof, as here, of predisposition is disputed and at best, slight, the defense of entrapment should be sustained as a matter of law. Support for this rule rests upon several grounds.

We believe that the facts in Russell regarding both the governmental conduct and other factors relating to predisposition are sufficiently distinguishable from the instant case so as to justify the adoption here of a modified standard. In both Russell and the instant case there was government instigation of the crime. But the intensity and duration of the Government's pressure differ substantially. In Russell the government agent visited the defendant at most on two occasions within a three-day period to discuss the manufacture of the drug "speed".[11] Russell, supra at 435-436. There is

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11 The agent also visited on one additional occasion within approximately one month of the prior occasion. Id., at 426.

no evidence of an initial refusal by the defendant to engage in the criminal conduct with which he was ultimately charged. Conversely, here the contacts by the government agents with Perer prior to the period covered by the indictment were extraordinary in number and also extended over a period of approximately four or five months. On this basis alone, it is fair to apply different standards.

Moreover, without considering the Government's efforts, in Russell the evidence of predisposition was practically undisputed and apparently substantial. The defendant, in Russell admitted that "the jury could have found him predisposed to commit the charged offenses." Id., at 433. Furthermore, the Supreme Court found categorically that the defendant was an active participant in an illegal drug manufacturing enterprise which began before the government agent appeared on the scene and continued after the government agent had left the scene. Id., at 436.

Here, there is no evidence that Perer was part of a systematic operation of dealing in firearms. If any testimony points to this type of predisposition at all, it is highly disputed and is merely circumstantial, uncorroborated evidence of one or two isolated transactions testified to by Rojas

from which at best, only slight predisposition could be inferred.

Even if it is conceded, arguendo, that the defendant was slightly predisposed and would have agreed to engage in unlawful conduct without substantial governmental persuasion, the fact is that the Government's pressure was so overwhelming so as to cause the commission of the crime charged, the fact that the defendant actually engaged in the crime unjustly exaggerates the degree to which the defendant might have been predisposed. As a result of the direct effect of the Government's conduct, i.e. the actual commission of the crime, most any jury is bound to find predisposition. Without it they would likely reason the crime would never have been committed. Slight evidence on predisposition such as would but for the Government's enticement, remain dormant, is seen or constructed by a jury and a guilty verdict returned.

This substantial prejudice is particularly significant here because the record is replete with undisputed evidence of the commission of at least the crime contained in Count Two relating to interstate transportation of firearms. In fact, the defendant admitted in the opening to the acts constituting this offense. (Tr. 8).

The rationale sought for modification of the Russell rule as applied to this case is a well-established precept of the Law of Evidence. This of course relates to the exclusion of evidence of prior similar acts as proof of the substantive offense. See McCormick, Evidence, §190 (1972). It is believed that evidence of this nature has so little probative value, balanced against prejudice generated, that it must be excluded. Id.

In a similar vein, the evidence of the commission of the substantive crime, while no doubt admissible, has such a prejudicial effect on the disputed evidence of slight predisposition. As with all kinds of prejudicial testimony, for example, impeachment type evidence, the court must undertake a balancing process to avoid undue prejudice. Here the balance is tipped so heavily towards the prejudice side so as to, at the very least, require a limiting instruction. Without one, as here, the conviction should be reversed.

II

IT WAS PLAIN ERROR TO ADMIT EVIDENCE OF PRIOR ARRESTS FOR PURPOSES OF IMPEACHMENT WITHOUT APPROPRIATE LIMITING INSTRUCTIONS

At the opening of the Government's cross-examination of Perer, the prosecutor inquired into the past arrest record of the defendant:

Q. Isn't it a fact that you were arrested in Paterson, New Jersey for attempted use of a deadly weapon in 1967?

A. No, sir.

Q. Isn't it a fact that you were arrested in Wayne, New Jersey in 1969 for offensive use of a weapon?

A. No, sir.

Q. Isn't it a fact that you were also arrested in Paterson, New Jersey for the unlawful use of heroin?

A. That is true.

THE COURT: Was there a conviction with respect to that, Mr. Garnett?

MR. GARNETT: Which charge, your Honor?

THE COURT: The heroin.

MR. RICHMAN: I would object your Honor.

THE COURT: You should object. If there is no conviction on the heroin I will instruct the jury to disregard it. (Tr. 247).

The Appellant contends it was plain error to admit evidence of prior arrests for purposes of impeachment where the court failed to warn the jury to discount past criminal offenses, remote in time or in kind, in considering the sufficiency of evidence of predisposition. This is consistent with the rationale behind the rule excluding evidence of prior similar acts as proof of the substantive offense. (See discussion supra.)

Unlike other criminal cases, in an entrapment case, the defendant has less real choice about taking the stand. He is then of course subjected to questions on prior arrests allegedly for impeachment purposes. Although these questions may be permissible for such purposes,[12] where there is a defense of entrapment, they have a strong and prejudicial effect on the jury in its assessment of predisposition.

This Court, in Morrison v. United States, 348 F.2d 1003 (2d Cir.) cert. denied 382 U.S. 905 (1965) has recognized the potential auxiliary dangers of admitting evidence of prior arrests in an entrapment case and has endorsed the

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12 Evidence of arrests, not the subject of conviction which bear on truth or veracity or relate to crimes of moral turpitude are admissible for the limited purpose of impeachment. McCormick, Evidence §42 (1972).

remedy sought here. In Morrison this Court stated:

> "Because defendants may be seriously prejudiced by the introduction, even though proper, of evidence bearing on their past criminal offenses, careful instructions are appropriate to limit the degree of prejudice. The principal danger, however, is that the government will introduce the evidence and that the jury will take it as proof of guilt." 348 F.2d, at 1005.

See also Sherman v. United States, supra at 382; Hansford v. United States, supra at 225-226.

Here the prosecution did ask the defendant about two prior arrests in 1969 for attempted use of a deadly weapon and offensive use of a weapon, respectively, and for the unlawful use of heroin. Although the defendant denied the existence of the arrests relating to the weapons charges, of course, the jury may choose not to credit his answer. These weapon charges were clearly remote in time and do not relate specifically to the charge of dealing in firearms or of interstate transportation of firearms.

The prejudice arising from the question and answer on the first heroin arrest is even greater.[13] First, the

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13 This question was actually improper within the impeachment rule on conduct not the subject of conviction if, in fact, no conviction existed. Although the transcript is incomplete on this score since the prosecutor does not continue this line of inquiry after being admonished by the court (Tr. 247), the Government's "rap sheet" indicates no conviction on this arrest. See Affidavit of Ronald L. Garnett, Assistant United States Attorney, submitted on behalf of the Government in opposition to Appellant's motion to reinstate his appeal.

the defendant admitted to the existence of the arrest. Second, it has nothing to do with crimes with which the defendant was charged. And third, the prosecutor did not identify the date when such arrest was made.[14] The jury could easily infer that it was within the time frame of the events presented at trial and thereby improperly give it undue weight in determining predisposition of the defendant on the entrapment issue.

Although prejudice arising from this testimony is substantial, it may have been overcome by appropriate limiting instructions. There were none given either during the trial or as a part of the charge.

While advocating this position, Appellant is well aware that the Supreme Court has acknowledged the right of the prosecution to make a searching inquiry into the defendant's own conduct and predisposition when the defense of entrapment is raised. Sorrells, supra at 451; Sherman, supra at 373. Yet this does not defeat the argument set forth above.

The Court in United States v. Ambrose, 483 F.2d 742, 748 (9th Cir. 1973) addressed just this problem, stating:

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14 Apparently the prosecutor was referring to the same 1969 arrest referred to in his first question, according to the "rap sheet" described above.

> "We agree with appellant that permitting the prosecution to make a searching inquiry into the predisposition of a defendant who raises the defense of entrapment does not thereby provide a license for the prosecution to roam at will through his past, either by the introduction of extrinsic evidence or by the use of cross-examination. The Government is constrained by familiar rules of relevancy and competency, by policies against undue prejudice or unfair surprise and by considerations pertaining to limitation of the range of issues with which juries must grapple, the trial judge's ability to control the conduct of the trial, and the confinement of cross-examination to matters raised on direct. Thus, although the prosecution is not circumscribed, when the defense of entrapment is raised, by the usual rules against the introduction of character evidence or evidence of prior acts, [citations omitted] the proffered evidence may be held inadmissible because of its remoteness from the offense charged or its hearsay nature, [citations omitted] or because of its unreliability or potential for unfair prejudice. [citation omitted]" (emphasis added).

Appellant contends that the trial court failed in its affirmative duty to exclude the evidence of prior arrests, remote in time and in kind to the crimes charged and in failing to provide appropriate limiting instructions. This failure we submit is grounds for reversal and a new trial.

III

THE DEFENDANT WAS DENIED A FAIR TRIAL AS A RESULT OF PREJUDICIAL STATEMENTS BY THE PROSECUTION IN ITS SUMMATION

The Assistant United States Attorney, at the outset of his summation, stated:

> "Mr. Richman just told you that the agents for the Government lied on that witness stand. If you believe those agents lied in their testimony, don't waste any time when you go into that jury room after the judge has charged you to come right back and acquit that defendant. The Government of the United States does not want convictions of innocent people on perjured testimony. We didn't go through this trial with the belief that our agents lied." (Tr. 304.) (Emphasis added)

Later, in his summation, he repeated this same thought:

> "Again, if upon belief they [the agents] lied, when you retire to the jury room for your deliberations, return and acquit the defendant.: (Tr. 310)

Still later, in his comments regarding Hochman's testimony, the Assistant United States Attorney stated:

> "When he [Hochman] lied on that witness stand the Government brought that to the court's attention. The Government, as I have stated before, does not want convictions based on perjured testimony." (Tr. 311)

It is well recognized that a prosecutor should not bolster the Government's case by placing the prestige of the United States Government behind the witnesses for the prosecution.[15] United States v. La Sorsa, 480 F.2d 522 (2d Cir.) cert. denied 414 U.S. 855 (1973). United States v. White, 324 F.2d 814, 816 (2d Cir. 1963); See also United States v. Puco, 436 F.2d 761, 762 (2d Cir. 1971), cert. denied 414 U.S. 844 (1973); Hall v. United States, 419 F.2d 582, 586 (5th Cir. 1969).

However, that is exactly what happened here. These three statements suggested that it would be unthinkable that agents of the United States would lie on the witness stand. Such a suggestion lends unjustified credibility to the testimony of not only Mazzilli, D'Atri and Varcos, but also to the testimony of Rojas, the government's informer, by lending them the prestige and backing of the United States.

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[15] Rojas should also be treated for this purpose as a Government witness. He was reluctantly called by the defendant when the prosecution declined to call him even though it had advised the jury of its intention to do so in its opening statement. Furthermore, with the approval of the court (Tr. 129), the defendant was forced to treat him as a hostile witness because much of his testimony was contrary to the expectation of defendant's attorney based on conversations with Rojas prior to the trial, as well as conversations with him fifteen minutes prior to the time Rojas took the stand.(Tr. 150) Furthermore, on the whole, his testimony was much more favorable to the prosecution. (See supra).

This conduct seriously jeopardized the defendant's defense of entrapment. Rojas was the only witness who testified to alleged gun sales by the defendant prior to Rojas' becoming a government informer in July, 1973. This was the only conceivable testimony upon which the jury could have properly relied in determining that the prosecution has met its burden of proving the defendant's predisposition toward committing the crimes charged.

Furthermore, there was disputed testimony in the record as to when Mazzilli met Perer. Both Rojas and Perer testified that it was in July, while Mazzilli claimed it was in October (Tr. 148, 158, 240, 251, 73). The credibility of Mazzilli on this point alone is critical to the defense of entrapment, since it goes to the heart of both Government inducement, as well as to the amount of governmental pressure placed on the defendant.

Notwithstanding an effort by Judge Brieant to provide the jury with a limiting instruction, knowing that one was essential, the damage had been done. The cumulative effect of the three individual statements, each buttressing the next, was so substantial that the prejudice and harm to the defendant could not be sufficiently negated by the court's instruction.

Cf. United States v. Bozza, 365 F.2d 206 (2d Cir. 1966). The court should have stopped counsel's discourse sua sponte. See Viereck v. United States, 318 U.S. 236, 248 (1943).

We submit that the verdict must be reversed and the case remanded for a new trial.

CONCLUSION

For the reasons set forth herein, the conviction of defendant Arnold Perer should be reversed on both counts, or in the alternative, a new trial ordered.

Respectfully submitted,

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